

**United States Department of Labor
Employees' Compensation Appeals Board**

S.W., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Luray, VA, Employer**

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**Docket No. 07-2436
Issued: March 24, 2008**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

COLLEEN DUFFY KIKO, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On September 25, 2007 appellant filed an appeal from decisions of the Office of Workers' Compensation Programs dated January 16 and July 27, 2007. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant sustained a recurrence of disability on July 26, 2006; and (2) whether the Office properly denied her request for a review of the written record.

FACTUAL HISTORY

On March 13, 2002 appellant, then a 56-year-old city carrier, sustained an employment-related contusion to the left hand and a right knee meniscal tear when she slipped and fell in the course of her federal duties. She did not stop work until January 14, 2003 when Dr. Dwight D. Kemp, a Board-certified osteopath specializing in orthopedic surgery, performed arthroscopic repair of the right knee. On March 3, 2003 appellant returned to limited duty and thereafter to regular duty. Dr. Kemp submitted reports describing appellant's condition and treatment.

On July 8, 2004 appellant submitted a (Form CA-2a) recurrence of disability claim, that was denied by the Office in an October 19, 2004 decision. In an October 28, 2004 report, Dr. Kemp noted findings on examination of the knee including a flexion contracture and effusion and that appellant walked with a limp. He reported that appellant's job duties as a city carrier required constant walking and climbing stairs and advised that her knee condition was due to a degenerative process greatly exacerbated by the employment injury, noting that approval for her surgery was delayed for nine months which entailed more walking, causing more wear upon the articular cartilage surfaces. Dr. Kemp opined that appellant's knee dysfunction greatly limited her work and all personal walking activities, concluding that she could not "continue to work indefinitely in her usual job."

On October 16, 2006 appellant submitted a CA-2a form recurrence of disability claim, alleging that she sustained a recurrence of disability on July 26, 2006. She did not stop work. By letter dated December 6, 2006, the Office informed appellant of the evidence needed to support her claim, including a medical report addressing the medical history, examination findings and a firm diagnosis of the condition with an opinion regarding the relationship between the need for continuing medical treatment and the accepted conditions. In an undated response, appellant stated that since the March 13, 2002 employment injury she had increasing knee pain.

By decision dated January 16, 2007, the Office denied appellant's recurrence of disability claim.

On an undated form, received by the Office on June 6, 2007, appellant requested reconsideration and submitted treatment notes from Dr. Kemp dating from December 16, 2002 to July 14, 2004, that were previously of record. On June 22, 2007 she requested a review of the written record.

In a July 27, 2007 decision, the Office denied her request for written record review.

LEGAL PRECEDENT -- ISSUE 1

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which had resulted from a previous injury or illness without an intervening injury or new exposure to the work environment that caused the illness.¹ A recurrence of medical condition means a documented need for further medical treatment after release from treatment for the accepted condition or injury when there is no accompanying work stoppage. Continuous treatment for the original condition or injury is not considered a "need for further medical treatment after release from treatment," nor is an examination without treatment.²

¹ 20 C.F.R. § 10.5(x); see *Theresa L. Andrews*, 55 ECAB 719 (2004).

² *Id.* at § 10.5(y); see *Mary A. Ceglia*, 55 ECAB 626 (2004).

The employee has the burden of establishing by the weight of reliable, probative and substantial evidence that the recurrence of disability is causally related to the original injury and should submit a detailed medical report.³

ANALYSIS -- ISSUE 1

The Board finds that appellant did not meet her burden of proof to establish that she sustained a recurrence of disability on July 26, 2006. Appellant did not submit any contemporaneous medical evidence to establish that she was disabled due to her accepted conditions or that she had a continuing employment-related condition, which required continuing medical treatment.⁴ By letter dated December 6, 2006, the Office informed appellant of the evidence needed to establish her recurrence claim. However, appellant did not submit any medical evidence in response to the request. She merely appended statements regarding her condition. The most recent medical report of record is Dr. Kemp's October 24, 2004 report. While he opined that appellant's job duties could exacerbate her knee condition, this report is not probative regarding appellant's medical condition as of July 26, 2006. A physician's statement that exposure to employment factors may cause a recurrence of symptoms in the future is not a sufficient basis on which to establish a claim as the fear of a recurrence of a condition if a claimant returns to work does not constitute a basis for compensation.⁵ Appellant did not submit medical evidence sufficient to establish her claim. She did not meet her burden of proof to establish that she sustained a recurrence of disability or of a medical condition and the Office properly denied her claim.⁶

LEGAL PRECEDENT -- ISSUE 2

A claimant dissatisfied with a decision of the Office shall be afforded an opportunity for an oral hearing or, in lieu thereof, a review of the written record. A request for either an oral hearing or a review of the written record must be submitted, in writing, within 30 days of the date of the decision for which a hearing is sought.⁷ If the request is not made within 30 days or if it is made after a reconsideration request, a claimant is not entitled to a hearing or a review of the written record as a matter of right.⁸ The Board has held that the Office, in its broad discretionary authority in the administration of the Federal Employees' Compensation Act, has the power to hold hearings in certain circumstances where no legal provision was made for such hearings and that the Office must exercise this discretionary authority in deciding whether to grant a hearing.⁹ Office procedures, which require the Office to exercise its discretion to grant or deny a hearing

³ *Id.* at § 10.404(b).

⁴ *See J.F.*, 58 ECAB ____ (Docket No. 06-186, issued October 17, 2006).

⁵ *Virginia Dorsett*, 50 ECAB 478 (1999).

⁶ 20 C.F.R. § 10.404(b); *see id.*

⁷ *See* 5 U.S.C. § 8124, 20 C.F.R. § 10.616.

⁸ *Claudio Vazquez*, 52 ECAB 496 (2001).

⁹ *Marilyn F. Wilson*, 52 ECAB 347 (2001).

when the request is untimely or made after reconsideration, are a proper interpretation of the Act and Board precedent.¹⁰

ANALYSIS -- ISSUE 2

The Office denied appellant's request for a review of the written record on the grounds that it was untimely filed. In a July 27, 2007 decision, the Office found that appellant was not, as a matter of right, entitled to a record review as her request, dated June 22, 2007, had not been made within 30 days of the January 16, 2007 decision. As appellant's request was dated June 22, 2007, more than 30 days after the date of the January 16, 2007 decision, the Office properly determined that she was not entitled to a review of the written record as a matter of right as her request was untimely filed.¹¹

The Office also has the discretionary power to grant a request for a record review when a claimant is not entitled to such as a matter of right. In the July 27, 2007 decision, the Office properly exercised its discretion by stating that it had considered the matter in relation to the issue involved and had denied appellant's request on the basis that the issue in this case could be addressed through a reconsideration application. The Board has held that, as the only limitation on the Office's authority is reasonableness, abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment or actions taken which are contrary to both logic and probable deduction from established facts.¹² In the present case, the evidence of record does not indicate that the Office committed any act in connection with its denial of appellant's request for a review of the written record which could be found to be an abuse of discretion. The Office therefore properly denied her request.

CONCLUSION

The Board finds that appellant failed to meet her burden of proof to establish that she sustained a recurrence of disability or recurrence of medical condition on July 26, 2006. The Board further finds that the Office did not abuse its discretion in denying her request for a review of the written record.

¹⁰ *Claudio Vazquez*, *supra* note 8.

¹¹ *Id.* The Board notes that the copy of the envelope addressed to the Branch of Hearings and Review found in the case record does not contain a postmark.

¹² *See Claudio Vazquez*, *supra* note 8; *Daniel J. Perea*, 42 ECAB 214 (1990).

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated July 27 and January 16, 2007 are affirmed.

Issued: March 24, 2008
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board